(8) 6

No. 86-71 & 86-97

In the
Supreme Court of the United States

October Term, 1986

CTS CORPORATION,

Appellant,

— vs. —

DYNAMICS CORPORATION OF AMERICA,

Appellee.

STATE OF INDIANA,

Intervenor-Appellant,

— vs. —

DYNAMICS CORPORATION OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE STATE OF NEW YORK IN SUPPORT OF APPELLANTS

O. Peter Sherwood
Solicitor General of the State of New York
Counsel of Record

Mary Ellen Burns
Deputy Chief Assistant Attorney General

Colvin W. Grannum
Assistant Attorney General

Robert Abrams
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 341-2020

26 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE

Amicus, State of New York, by Robert Abrams, Attorney General of the State of New York, respectfully submits this brief in support of appellants pursuant to Supreme Court Rule 36.4. *Amicus* urges this Court to reverse the judgment of the court of appeals and to affirm the power of a state to enact legislation that adjusts the variety of interests effected by takeovers of local corporations.

New York has an interest in the issues presented by this appeal because this Court's decision may affect the validity of a recent amendment to the New York Business Corporation Law ("NYBCL"). The amendment, N.Y. BUS. CORP. LAW §912 (McKinney 1986), and the Indiana law challenged in this litigation, The Control Share Acquisitions Chapter of the Indiana Business Corporation Law, IND. CODE ANN. §§23-1-42-1 to 11 (Burns Cum. Supp. 1986), operate quite differently, but they advance common legitimate state interests. As *amicus*, New York seeks to protect those interests. New York emphasizes the power of states to enact legislation, consistent with *Edgar v. MITE Corp.*, 457 U.S. 624 (1982),[1] that apportions the local interests and rights affected by changes in corporate control and fundamental corporate events even though the legislation incidentally impacts on interstate commerce. The challenged Indiana act, Section 912 and numerous other state laws represent the best efforts of many states to exercise their traditional authority over such matters while complying with the limited guidelines articulated in *Edgar v. MITE, Corp.*

This Court's response to Indiana's attempt to prescribe rules governing the exercise of the voting rights associated with newly-acquired control shares may eventually guide lower courts' assessment of New York's statute. Like Indiana's law, Section 912 governs internal corporate matters; it does so by setting requirements for certain business combinations between New York

---

[1] The State of New York also participated as amicus curiae in *Edgar v. MITE Corp.*, and supported the constitutionality of the Illinois law challenged there.

resident domestic corporations and certain shareholders of 20 percent or more of the outstanding voting stock ("interested shareholders") of resident domestic corporations. Authority to regulate the voting rights of shares and prescribe requirements for business combinations traditionally has resided with the state under whose laws the corporation is organized. For example, section 912 restricts interested shareholders' access to corporate assets by prescribing requirements for mergers, consolidations, dissolutions and other dispositions of significant corporate assets. Its goal is to promote the long-term well-being of New York resident domestic corporations.

The type of business combination affected by section 912 usually accompanies highly-leveraged unilateral takeovers. These combinations frequently change the financial structure, character, investment and employment policies, and earnings of the local corporation. Too often such changes are initiated in order to fund the takeover itself and operate to the long-term detriment of the corporation. These combinations may also alter the legal relationships and expectations among and between shareholders of the resident domestic corporation. Interests outside the corporation may also be significantly affected, particularly those of suppliers and employees of the corporation and other local businesses. Choosing from several approaches, 32 states have enacted statutes that protect and balance the variety of interests implicated by transactions conceived to force major internal corporate changes in corporations deeply rooted in those states.[2]

Lastly, the State of New York is the home of thousands of corporations and corporate investors of every variety. The New York and American Stock Exchanges are located in New York and are pillars of the State's economy. As the site of a staggering volume of transactions involving corporate securities, assets and control, the State's interest in the Court's decision is

---

[2] Alaska, Arkansas, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wisconsin.

keen: the decision may impact on the economy of the State, how people do business within it, and the development of its commercial law.

In sum, the State of New York has an interest in protecting the power of states to enact statutes which, by constitutionally permissible means, adjust the variety of local interests affected by corporate takeovers. We believe that the Indiana statute satisfies the requirements of the Commerce and Supremacy clauses. Likewise, we are satisfied that the New York statute is fully compatible with the provisions of the United States Constitution, although we recognize that the Court's decision in this case is not an occasion – and should not be the occasion – to resolve this question.

SUMMARY OF ARGUMENT

Acting pursuant to powers granted to it under the Supremacy and Commerce Clauses of the Constitution, Congress enacted the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)(1982), which brought a measure of protection to shareholders of corporations that were the targets of takeover efforts. In so doing, Congress did not evince an intention to preempt state statutes covering the same subject matter. It neither sought to impose a national governmental policy regarding corporate takeover contests nor to preclude the states from enacting laws that strike a different balance.

Recently, in *Edgar v. MITE Corp.* this Court considered the effect of the Williams Act on an Illinois statute which regulated certain takeover contests and declined to hold that the Williams Act preempts state regulation in this area or otherwise imposes an overriding national policy respecting takeovers. Nevertheless, the court of appeals devined the existence of such a policy and invalidated the Indiana statute which sought to regulate the exercise of voting rights in connection with takeovers of corporations having substantial contacts with that state. In so doing, the lower court cast grave doubt on the traditional power of a state to enact legislation that affects transactions designed to capture corporate control, alter corporate governance and

reallocate substantial assets of corporations firmly connected to that state. Its decision should be reversed.

Absent express preemption of state power by Congress, a federal law preempts only state laws that cannot be reconciled with it. The purpose and scope of the Williams Act are limited to protecting shareholders through full and fair disclosure of information pertinent to securities transactions. State laws that provide other benefits to shareholders, regulate local corporations, accord rights to their employees and aid the surrounding economies are not affected by the Williams Act. Rather than regulating the purchase and sale of securities, such laws usually operate to limit an individual's exercise of control over a corporation or his ability to reallocate significant corprate assets. Misconstruing the reach of the Williams Act, the courts below erroneously struck down the Indiana act even though the purposes and provisions of the two statutes do not conflict and could easily have been reconciled. Contrary to the holdings of the courts below, the Indiana act need not cause any delay that conflicts with the provisions of the Williams Act.

The Commerce Clause itself imposes restraints on the power of states to enact laws that directly burden interstate commerce or discriminate against it. This Court has consistently acknowledged the authority of the several states to implement nondiscriminatory laws that are intended to carry out legitimate state purposes.

The corporation is a creature of state law and regulation of the internal affairs of resident corporations is manifestly a legitimate state concern. In striking down the Indiana act on Commerce Clause grounds, the court of appeals accorded only lip service to Indiana's substantial concern in apportioning rights affected by changes in control and asset deployment of corporations that incorporate in Indiana and otherwise are strongly tied to the state. The interests of states in those internal corporate matters are legitimate and substantial, and if a state statute is drawn to further them it should withstand challenges based on the Commerce Clause.

Indiana's statute is constitutional because it only regulates post-acquisition voting rights for control share acquisitions. It does not directly regulate interstate transactions; nor does it discriminate against acquisitions commenced by out-of-state residents. Despite the holdings of the courts below, the extent of the Indiana statute's burden on interstate commerce is speculative. The record contains no evidence that the statute will adversely affect interstate commerce. On the other hand, the Indiana act benefits local shareholders by granting them a voice in proposed material changes in voting control, permitting them to consider a tender offer without fear of a shareholder stampede, and promoting fair treatment of non-tendering shareholders.

The Indiana act is only one of a variety of measures enacted by states that bear on the subject of corporate takeovers. The constitutionality of each such measure should be assessed individually given differences in the degree of local contact required, the particular state interest intended to be addressed and other factors. The court of appeals' decision appears to have a broad sweep. It draws into question any state law which a court may view as slowing "the important commerce of corporate control," *see Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 264 (7th Cir. 1986). This Court should reject the lower court's effort to override state laws and impose a national policy without the benefit of clear Congressional guidance.

ARGUMENT

I. The Preemption Holding Of The Courts Below Finds Little Support In The Williams Act Or *Edgar v. MITE Corp.*, And Unnecessarily Casts Doubt On State Laws That Do Not Conflict With The Williams Act

Absent explicit preemptive language in a federal statute, courts should not declare a state statute invalid under the Supremacy Clause, U.S. Const. art. VI, cl.2, unless the federal and state laws are irreconcilable. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983); *see Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The preemption analysis starts with the assumption that in fields traditionally occupied by the states, "the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting).

Aside from express preemptive language, the clear and manifest purpose of Congress to preempt all state law may be found where: the nature of the subject matter regulated permits no other conclusion, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); a pervasive scheme of federal regulation leaves no room for supplementary state regulation, *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. at 633; "compliance with both federal and state regulations is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-43; or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Edgar v. MITE Corp.*, 457 U.S. at 631 quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

States have traditionally occupied the field of corporate law. *Burks v. Lasker*, 441 U.S. 471, 479-80 (1979). "Corporations are creatures of state law, and ... state law will govern the internal affairs of the corporation." *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478-79 (1977). In this appeal, the presumption against preemption is entitled to great weight due to the absence of any contentions that the Williams Act contains express preemptive language, evinces an intent to occupy the entire field or that it would be impossible to comply with the provisions of the Williams Act and the significantly different provisions of the Indiana law. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973). Here, as in *Edgar v. MITE Corp.*, the sole issue is whether the Indiana law frustrates the objectives of the Williams Act in "some substantial way." *Edgar v. MITE Corp.*, 457 U.S. at 632 (White, J.).

Resolution of this issue requires that operation of the challenged state law be measured against the purpose of the federal statute. The Williams Act, passed in 1968, sought to close the regulatory gap caused by the increased use of cash tender offers in corporate acquisitions, "a device that had 'removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities law.' " *Edgar v. MITE Corp.*, 457 U.S. at 632, quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977). The Williams Act is primarily a full disclosure law which furnishes important information to all target shareholders, and provides certain protections to target shareholders who elect to tender their stock.[3]

---

[3] Under the Williams Act, disclosure is required of persons who acquire more than five percent of certain classes of securities or commence a tender offer which would give them ownership of more than five percent of certain classes of securities. 15 U.S.C. §§78m(d)(1), 78n(d)(1). The information that must be disclosed includes: the background and identity of the acquiror; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in corporate structure; and the extent of the acquiror's holdings in the target

(Footnote continued)

When Congress amended the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §§78a *et seq.* by enacting the Williams Act, the amendment did not disturb section 28(a) of the 1934 Act, 15 U.S.C. §78bb(a). In pertinent part, Section 28(a) provides as follows:

> Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

Section 28(a) clearly expresses Congress' intent to limit the preemptive effect of the federal securities laws. This intent is grafted onto the Williams Act. Thus, any inquiry into the preemptive effect of the Williams Act must be illuminated by the unmistakeable fact that section 28(a) is intended to "protect, rather than limit, state authority." *Leroy v. Great Western United Corp.* 443 U.S. 173, 182 (1979); *see Agency-Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1038 (1st Cir. 1982).

The Indiana control share acquisitions law does not conflict with the Williams Act or frustrate its objectives in a substantial way. The statutes operate in related, but separate arenas. The Indiana law defines the post-acquisition voting rights of certain controlling shares while the sole purpose of the Williams Act is to provide investors with full and fair disclosure regarding tender offers. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 35; *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58

(Footnote continued)
company. 15 U.S.C. §78m(d)(1). With respect to tender offers: (1) stockholders who tender their shares may withdraw them during the first 7 days of a tender offer and if the offeror has not yet purchased their shares, at any time after 60 days from the commencement of the offer, 15 U.S.C. §78n(d)(5); and (2) all shares tendered must be purchased for the same price; if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U.S.C. §78n(d)(7). *See Edgar v. MITE Corp.*, 457 U.S. at 632.

(1975); 113 Cong. Rec. 24664 (1967)(Comments of sponsor, Senator Williams); S. Rep. No. 550, 90th Cong., 1st Sess. (1967)(Senate Report). Moreover, the Indiana law protects a broader range of interests than those protected by the Williams Act, including local economic and social interests likely to be affected by transfers of corporate control. *See Edgar v. MITE Corp.*, 457 U.S. at 647 (Powell, J., concurring in part).

The court of appeals swept aside the Indiana law on the ground that it frustrated an objective of the Williams Act — the "delicate balance" struck between the tender offeror and incumbent management. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 262 (7th Cir. 1986). However, in *Piper v. Chris-Craft Industries, Inc.*, this Court stated:

> Congress was indeed committed to a policy of neutrality in contests of control, but its policy of evenhandedness does not go to either the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality, is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors.

430 U.S. at 29. Moreover, in *Edgar v. MITE Corp.*, Justice White's conclusion that the policy of neutrality underlying the Williams Act should be accorded preemptive effect failed to command a majority of this Court.[4] *See Edgar v. MITE Corp.*, 457 U.S. at 646 (Powell, J., concurring); *Id.* at 655 (Stevens, J., concurring). In brief, the decision to strike down the Indiana act was supported neither by this Court's case law nor the

---

[4] Justice White's opinion has been accorded great weight by several courts of appeals, *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986); *Securities and Exchange Commission v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945 (9th Cir. 1985); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982), but none of the statutes reviewed by those courts was anologous to Indiana's law.

legislative history of the Williams Act. Tacitly conceding that it had found no clear and manifest intent of Congress to preempt state laws like the one challenged here, the court of appeals nevertheless took the required "big leap," and toppled the Indiana law. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d at 262.

The court of appeals' "delicate balance" analysis also casts doubt on a variety of other state statutes which *amicus* believes do not frustrate the full and fair disclosure purpose of the Williams Act or upset that act's policy of neutrality. Generally, these statutes protect interests far broader than those addressed in the Williams Act. These statutes reflect a variety of approaches. Control share acquisitions statutes, like that of Indiana, allow shareholders or their duly elected directors to determine voting rights for control share acquisitions. Business combination statutes generally require similar approval for business combinations, broadly defined to include a wide range of transactions involving substantial corporate assets.[5] Fair value statutes grant non-tendering minority shareholders the right to receive a statutorily prescribed fair price to protect them from being "freezed out" by the controlling shares.[6] Still other statutes combine features of each of the above laws.[7] The delicate balance reasoning adopted by the court of appeals implies that it would invalidate all of these statutes because they may make acquisition of control of a corporation or access to its assets more

---

[5] New York, N.Y. BUS. CORP. LAW §912 (McKinney 1986), New Jersey, 1986 N.J. Sess. Law Serv. Chap. 74 (West), and Kentucky, KY. REV. STAT. §271A.397 (1984) have enacted different versions of business combination statutes.

[6] Pennsylvania, PA. STAT. ANN. tit. 15, §1910 (Purdon Supp. 1986), has enacted a fair value statute.

[7] Hybrid statutes have been enacted by Wisconsin, WIS. STAT. §§180.25(9), 180.725 (1986); Maryland, MD. CORPS. & ASS'NS CODE ANN. §§3-601 *et seq.* (1985); Kentucky, KY. REV. STAT. §271A.397-99 (1984); Michigan, MICH. COMP. LAWS §§450.177 *et seq.* (Supp. 1986); and other states.

difficult to accomplish.[8] As demonstrated earlier, the Williams Act should not be construed to have such an intrusive impact on traditional state authority.

In sum, read in light of settled principles of federalism, section 28(a) of the 1934 Act, the legislative history of the Williams Act and the broad traditional role of the states in regulating corporations, no basis exists for concluding that Congress intended to preempt state laws pertaining to the exercise of voting rights, use of corporate assets, transfer of corporate control or treatment of minority interest shareholders. All of these transactions impact on internal corporate matters and implicate interests beyond those sought to be protected by the Williams Act.

In addition, no policy or objective of the Williams Act is frustrated by these state laws. Lower court decisions that find preemption appear to be based upon the mistaken belief that since interstate securities transactions are used to accomplish these major corporate changes, no state can enact legislation which affects these transactions. *Cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (Court rejected the "novel suggestion that because the economic market for petroleum products is nationwide, no state has the power to regulate the retail marketing of gas.") But Congress has not addressed the impact of these major corporate changes, and until it does so, this Court should leave the states free to serve as laboratories for finding effective ways of regulating takeovers. Accordingly, thi.

[8] The business combinations regulated by Section 912, including mergers, consolidations, dissolutions and other reallocations of substantial corporate assets, have long been regulated by New York law in some fashion. Measuring section 912 against the Williams Act reveals that it *does not*: interfere with the disclosure requirements of the Williams Act; purport to regulate the purchase and sale of securities; impose time limits inconsistent with the Williams Act (§912(b)); effect voting rights; restrict the acquiror's ability to oust incumbent management; or permit a state official to usurp shareholders' decisions to sell their shares. The New York act only restricts the freedom of resident domestic corporations to execute a business combination that will redirect substantial corporate assets principally for the benefit of the newly-acquired controlling interest.

Court should hold that Indiana's control share acquisitions statute is not preempted by the Williams Act. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.; Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission.*

II. State Statutes, Like Indiana's, That Adjust The Various Interests Effected By Corporate Takeovers Are Constitutional For They Are Nondiscriminatory And Have Only Incidental Effects On Interstate Commerce

The Commerce Clause provides that "Congress shall have Power... to regulate Commerce... among the several States." U.S. Const. art I, §8, cl. 3. While it is well settled that the dormant Commerce Clause is a limitation on the power of the states to affect interstate commerce, *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), it is also clear that states are not precluded from enforcing local laws that incidentally burden interstate commerce. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1961). Direct burdens on interstate commerce are prohibited, but the Commerce Clause permits states to implement laws which affect interstate commerce if the state interest is legitimate, and the state regulation is nondiscriminatory. *Brown-Forman Distillers Corp. v. New York State Liquor Authority ("NYSLA")*, 106 S. Ct. 2080 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Minimal inquiry is required to recognize the constitutional infirmity in state statutes that directly regulate or discriminate against interstate commerce. *See, e.g., Brown-Forman Distillers Corp. v. NYSLA*, 106 S. Ct. at 2080; *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In contrast, when a state statute has only indirect effects on interstate commerce and regulates evenhandedly, courts must examine whether the state's interest is legitimate and whether the burden on commerce is outweighed by the local benefits. *Brown-Forman Distillers*

Corp. v. NYSLA, 106 S. Ct. at 2080; *Edgar v. MITE Corp.*, 457 U.S. at 640; *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. Where, as here, the challenged state statute furthers weighty, legitimate state interests it does not offend the constitution.

Citing *Edgar v. MITE Corp.*, the courts below held that Indiana's control share acquisitions statute violated the Commerce Clause. However, the majority opinion in *Edgar v. MITE Corp.* supports neither the holding nor reasoning of the courts below. First, the characteristics of the Indiana control share acquisitions statute bear no resemblance to the provisions of the Illinois Business Takeover Act which this Court invalidated.[9] Furthermore, the Court acknowledged the legitimacy of Illinois' interest in protecting local investors, but concluded that the means used unnecessarily burdened interstate commerce and did not plainly further the interests asserted by Illinois. *Id.* at 643-46. Ignoring the limited reach of this Court's holding in *Edgar v. MITE Corp.*, the courts below invalidated the Indiana law without giving proper weight to the legitimate interests of Indiana or the variety of benefits derived from its statute. In fact, the court of appeals went so far as to suggest that generally states have limited interests in regulating the effects of corporate takeovers. Of course, several weighty interests support state legislation that adjusts the variety of local interests likely to be directly effected by corporate takeovers. Note, *State Regulation of Tender Offers: Legislating Within The Constitutional Framework*, 54 Fordham L. Rev. 885, 901 (1986). Takeovers are designed to have a direct impact on the fundamental internal affairs of target corporations, specifically corporate control and the allocation of assets. For example, they implicate interests of employees, minority shareholders and incumbent management as well as businesses located in the area where the corporation does substantial business. Thus, while takeovers may be accomplished by interstate transactions, local interests traditionally regulated by the states are frequently impacted directly.

[9] The Illinois act allowed the Illinois Secretary of State to block indefinitely a nationwide tender offer. The Indiana act, on the other hand, assigns no role to the state in takeover contests, and does not regulate the transfer of stock.

Corporations and corporate shares are creatures of state law. *Cort v. Ash*, 422 U.S. at 84. Despite increased trading of corporate shares in interstate and international commerce, shares remain items over which the states have significant authority. The initial features of corporate stock, including voting rights, were created by states, and states retain the authority to modify or amend those features. That authority includes the power to define the circumstances under which shares may be used to gain control over a corporation or to reallocate corporate assets. Thus, contrary to the court of appeals' belief, the federal government and states share a joint interest in the "commerce of corporate control." *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d at 264.

Some of the specific goals states seek to achieve by enacting various forms of takeover legislation include: (1) protecting local non-tendering shareholders from the effects of two-tier "freeze-out" transactions; (2) permitting shareholders to participate in decisions regarding fundamental corporate events such as mergers, consolidations, and sales and pledges of assets; (3) encouraging certain types of investment strategies considered good for the economy of the state; and (4) eliminating the need for incumbent management to focus upon certain defensive strategies considered unhealthy for the state's economy. Each of these interests is important to the states and in assessing the validity of a state statute under the Commerce Clause, courts should accord these interests great weight.

The court of appeals' failure to accord proper weight to Indiana's stated interests renders its *Pike* analysis defective.[10] Unlike the statute considered in *Edgar v. MITE Corp.*, Indiana has a strong interest in the corporations covered by its control share acquisitions act. The Indiana act applies only to corporations organized under the laws of Indiana with 100 or more

---

[10] Application of the *Pike* balancing test is appropriate because the Indiana act does not directly regulate interstate transactions. Instead, once the stock acquisition is completed, the statute allows shareholders to determine whether voting rights will be accorded to an acquiror of a controlling interest.

shareholders which have their principal place of business, principal offices or substantial assets within Indiana, and more than ten percent of their shares owned by Indiana residents. Thus, the Indiana act covers corporations that were incorporated in the state and in which Indiana residents have a substantial ownership interest and which do substantial business in the state or maintain substantial assets there.

These firm ties between the covered corporations and Indiana permit the state to pursue several permissible objectives: protecting resident shareholders and local economies, and regulating internal corporate affairs. Sargent, *Do The Second Generation State Takeover Statutes Violate The Commerce Clause?*, 8 Corp. L. Rev. 3 (1985). Because the Indiana law is directed at local matters, its effect on interstate commerce is incidental and its burden on interstate commerce is modest. Additionally, the Indiana law regulates evenhandedly inasmuch as it makes no distinction between acquisitions initiated by out-of-state residents and those initiated by state residents.

The Indiana law advances the legitimate state interests identified. It benefits Indiana shareholders because it only applies to Indiana corporations in which Indiana residents have a substantial ownership interest. It protects shareholders by permitting a majority of disinterested shareholders to determine whether a material change in voting control is in their best interests. Because it requires express shareholder approval of a transfer of controlling voting rights in a corporation, the statute allows resident shareholders to discount the possibility of a shareholder stampede and permits them to focus on factors, including the probable local economic and social impact of a takeover, which they might not otherwise evaluate.

The Indiana act also advances the state's interest in regulating the internal affairs of corporations organized under the laws of Indiana. The statute is drawn to further this interest. It applies to voting rights, manifestly an internal matter, of corporations organized under the laws of Indiana. *APL Limited Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216, 1223 (D.C.

Minn. 1985). It does not apply to foreign corporations as did the statute examined in *Edgar v. MITE Corp.*

We are especially troubled by the aspect of the court of appeals' opinion that suggests that the Commerce Clause condemns state statutes that require shareholder or board of director approval of fundamental internal corporate changes initiated through interstate stock transactions. This notion implicates statutes like the one enacted by New York even though they plainly advance legitimate state interests without excessively burdening interstate commerce.

In this regard, Section 912, furthers several legitimate state interests. As a threshhold matter, the "resident domestic corporations" covered by section 912 are closely connected to New York so as to achieve the State's permissible purposes.[11] Secondly, Section 912 furthers several important state objectives, chief among them is promoting the long-term well-being of New York resident domestic corporations. *See* Governor's Program Memorandum, 1985 N.Y. Laws Chap. 915. The New York law accomplishes this goal by forbidding resident domestic corporations from engaging in business combinations with an interested shareholder for five years unless the business combination or controlling share acquisition was approved by the board of directors prior to the interested shareholder's stock acquisition date. Section §912(b). Five or more years after the interested shareholder's stock acquisition date, the resident domestic corporation may engage in a business combination with the interested shareholder if it obtains the affirmative vote of the holders of a majority of the outstanding stock not beneficially owned by such interested shareholder or pays the shareholders, other than the interested shareholder, a statutorily prescribed formula price designed to ensure that all holders of shares of

---

[11] The jurisdictional predicate required to trigger Section 912 is more strict than under Indiana law. Section 912 only covers corporations organized under the laws of New York *and* which have (1) their principal offices *and* (2) significant business operations *and* (3) at least 10 percent of the ownership of its voting stock located in New York. NYBCL §912(a)(13).

voting stock will receive at least the highest price per share paid by the interested shareholder, determined as of the date such business combination was first proposed in its final, definitive form. NYBCL §912(c).[12]

Thus, section 912 has the following effects: (1) it encourages takeovers that the acquiror and target management agree are in the best interests of New York corporations, their employees and shareholders; (2) it discourages unilateral takeovers which depend on immediate access to significant assets of the corporation; (3) it encourages long-term investment commitment by interested shareholders who acquired their controlling interest without the approval of the board of directors; and (4) it protects resident non-tendering shareholders from "freeze-out" transactions.[13] Achieving each of these benefits is important to the economic and social well-being of New York.

On the other side of the scale, section 912 does not excessively burden interstate commerce. It has a limited impact on the interstate commerce of corporate stock and control. In contrast to the statutes struck down in *Edgar v. MITE Corp.*, and by various other federal courts, section 912 does *not*: (1) regulate the sale of shares; (2) protect incumbent management from replacement by an interested shareholder; (3) limit the voting rights of newly-acquired shares; (4) require approval of the acquisition of controlling interests; (5) prohibit a change of the corporation's line of business; (6) grant the State a role in determining whether an interstate acquisition will proceed; or (7) deprive shareholders of the right to sell their shares at a premium.

---

[12] A related provision of New York law, NYBCL §513, restricts the use of "greenmail" by resident domestic corporations by requiring board of director and shareholder approval of such purchase or agreement to purchase.

[13] Two corollary benefits are discouraging excessive corporate debt and encouraging long-term interests, especially research and development and business diversification.

The court of appeals' opinion nonetheless calls statutes like Section 912 into question apparently on the ground that the Commerce Clause bars states from sanctioning any activity that slows "the important commerce in corporate control." *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d at 264. Implicit in the court's opinion is its belief that tender offers benefit shareholders and, therefore, the Commerce Clause should protect tender offers. In other words, under the guise of a Commerce Clause analysis, the court of appeals imposed its economic judgment regarding the value of tender offers. Such economic policy judgments, however, are reserved for the Congress or state legislatures. In the absence of a national policy regarding corporate takeovers, it is not appropriate for federal courts to attempt to fill the void by judicial interpretations of the Commerce Clause. This is especially so in light of Congress' disinclination, to date, to formulate an approach to the issue and the disputed economic data regarding the value of takeovers, particularly highly-leveraged hostile ones. Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role In Corporate Governance*, 84 Col. L. Rev. 1145 (1984); *see* Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wisc. L. Rev. 125, 156; Lipton, *Takeover Bids in the Target's Board Room*, 35 Bus. Law. 101 (1979).

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York
December 4, 1986

O. PETER SHERWOOD
Solicitor General of the State of New York

Counsel of Record

MARY ELLEN BURNS
Deputy Chief Assistant Attorney General

COLVIN W. GRANNUM
Assistant Attorney General

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
Tel. No. (212) 341-2020